

If transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software or the subsequent software updates will be subject to Retailers' Occupation Tax. See 86 Ill. Adm. Code 130.1935. (This is a GIL).

February 4, 2003

Dear Xxxxx:

This letter is in response to your letter received by our office on October 22, 2002. We apologize for the delay in responding to your inquiry. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/Laws/regs/part1200/>.

In your letter, you have stated and made inquiry as follows:

As a result of a recently completed Illinois State sales tax audit it was determined by your auditor that software sales and maintenance renewals under our standard software license agreement are not considered 'taxable Sales' for purposes of Illinois state sales tax.

Going forward, based on the results of this audit, we no longer plan to collect and remit sales tax on software sales, and maintenance renewal invoices, made under this form of license agreement.

To support this position in the event of future potential Illinois sales tax audits, please confirm to us in writing that software sales and maintenance renewal under this form of a license agreement are non-taxable in Illinois. Our standard software license agreement is attached for your review and reference.

Please send you letter confirming the tax-exempt status of software sales and maintenance renewals under this form of a license agreement to:

NAME/ADDRESS

If you have any question regarding this matter please call me, or contract you auditor.

DEPARTMENT'S RESPONSE:

Generally, sales of “canned” computer software are taxable retail sales in Illinois. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See subsection (c) of the enclosed copy of 86 Ill. Adm. Code 130.1935. Sales of software are taxable regardless of the means of delivery. For instance, the transfer or sale of canned computer software downloaded electronically would be taxable.

Custom computer programs or software are prepared to the special order of the customer. The selection of pre-written or canned programs assembled by vendors into software packages does not constitute custom software unless real and substantial changes are made to the programs or creation of program interfacing logic. See subsection (c)(3) of Section 130.1935.

If transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software or the subsequent software updates will be subject to Retailers’ Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer’s duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under subsection (c) of Section 130.1935, they may not be taxable. But, if maintenance agreements provide for updates of canned software, and the charges for those updates are not separately stated and taxed, then the whole agreement would be taxable as sales of canned software.

The Agreement, entitled “Master Software License and Services Agreement,” enclosed with your letter does appear to meet the criteria as a license of computer software under subsection (a)(1) of Section 130.1935. However, please note that the additional agreement, entitled “End User License and Services Agreement,” that is printed on the back of the large envelope does not appear to meet the criteria as a license of computer software under subsection (a)(1)(A) of Section 130.1935 because it does not require the signature of the licensor and the customer.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b) described above.

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk
Enc.